Assessment Year 1997-98

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Income Tax Appeal No. 118 of 2004

Reading and Bates Drilling Company
As agent of Mr. Daniel Gates
……..…. Appellant

Versus

The commissioner of Income-tax
Dehradun.
……..….. Respondent

Ms. Krishi Shukla, learned counsel for the appellant.
Ms. S.K. Posti, learned counsel for the respondent.

Coram : Hon'ble P.C. Verma, J.
Hon'ble P.C. Pant, J.

This is an appeal preferred under Section 260A of the Income Tax Act, 1961 filed by the appellant against the judgment and order dated 26.03.2004 passed by the Income Tax Appellate Tribunal, New Delhi in I.T.A. No. 1524/Del/2000.

2) Reading and Bates Drilling Company, appellant, is a non-resident foreign company. During the year under consideration, the said non-resident company executed off-shore drilling contracts in India. Reading and Bates Drilling Company employed technicians to work in off-shore oil rigs in Indian. Mr. Daniel Gates was such a technician employed by the appellant-company during the relevant previous year to work in the offshore oil rigs in India.

3) The question raised before us is as follows:

> *"Whether on the facts and circumstances of the case, the Tribunal erred in law in holding that the off-period' salary paid to the petitioner was liable to tax in India?"*

4) Heard learned counsel for the parties and perused the record.

5) As this Court has discussed in Income Tax Appeal No. 57 of 2002; the Commissioner of Income Tax, Dehradun and another Vs. SEDCO Forex International Drilling Co. Ltd., the reasoning regarding this question is given in following paragraphs.

6) Section 4 of the Act is a charging section. It imposes tax on the total income of the previous year of every person. Under section 4(2), tax is deducted at source or paid in advance, where it is so deductible or payable. Section 5(2), on the other hand, restricts the scope of total income of a non-resident to the income which is received or deemed to be received in India or which accrues or which is deemed to accrue to him during such year.

7) Section 9(1)(ii) interalia lays down that income which falls under the head "Salaries", if it is earned in India, shall be deemed to accrue to the non-resident during such year. Therefore, Section 9 is a deeming section. It brings in certain types of incomes, which may not come under Section 5, into the definition of "Total Income" under Section 2(45). Section 9(1)(ii) read with Explanation provides fro an artificial place of

accrual for income taxable under the head “Salaries”. It enacts that income chargeable under the head “Salaries” is deemed to accrue in India if it is earned in India i.e. if the services under the contract for employment is rendered in India. In such a case, the place of receipt or actual accrual of salary is immaterial. In this case we are concerned with application of law to the facts of this case.

8) It is well settled that in order to ascertain the intention of the contracting parties one has to study the terms and conditions of the contract and in appropriate cases one has to see the surrounding circumstances including the conduct of the parties. In this case the contract provides for ON Period and Off periods. The contract is for two years. It refers to Alternating Time Schedule. It covers both the periods. The Off period follows the ON periods. Therefore, both the periods form an integral part of the contract. It is not possible to give separate tax treatments to On Periods and Off period salaries. It is argued that period following ON period was not a rest period. We do not find any merit. After 35/28 days of hard work, the technician had to go back to the country of his residence. The Off period followed the ON period. They both formed part of an Integral scheme. That even under the Finance Act of 1999 the new explanation uses the term “Rest period/Leave period”. For above reasons, we find merit in the arguments of the revenue. Further even assuming that the period following ON period was a standby arrangement and not a Rest period, we find that the assesssee had to undergo training during the said period. It is important to note that the work on the oil rigs is hazardous. The assessee had to remain fit during the rest period. Hence, he had to undergo demonstrations and training

but all that has a nexus with the services which he had to render in India. Hence, the payment which he received was for his services in India. In this connection it may be noted that the Explanation to Section 9(1)(ii) introduced by Finance Act of 1983 refers to what constitutes “income earned in India”. This Explanation was introduced by Finance Act of 1983 w.e.f. 01.04.1979 to get over the judgment of the Gujarat High Court in 124-ITR-391 in which it was held that in order to attract Section 9(1)(ii) of the Act, liability to pay must arise in India. By the said Explanation, the original intention under Section 9(1)(ii) has been revived. It explains the expression “income earned in India” to mean payment for the services in India even if the contract is executed outside India or amount is payable outside India. However, from the said Explanation it is not possible to infer the corollary viz. that in all cases where services are rendered outside India, the salary cannot be deemed to accrue in India, ipso facto. In certain cases, even if the services were rendered outside India, the income can still accrue or arise in India. It would depend on facts of each case. In this case even assuming that there was no rest period as alleged by the assessee and that payment was for standby, we are of the view that training abroad during this period was directly connected with the work on the rigs in India. It made the assessee mentally and physically fit. Therefore, the payment of salary for OFF period was income earned in India i.e. for services rendered in India under Section 9(1)(ii). We would like to point out that in this case the assessment records show that from the income of the Indian operations the salary in its entirety (including salary for the off period) has been paid by the employer Company. This conduct shows the intention of

the contracting parties. Hence, the entire salary for both the periods was taxable in India under Section 9(1)(ii).

9) For the reasons aforesaid, we answer this question in the negative i.e. in favour of the Department and against the assessee.

10) Appeal is dismissed accordingly. No order as to costs.

(P.C. Pant, J.) **(P.C. Verma, J.)**

Dt. 14th July, 2005,
H. Negi